>>> "George Mullison" <gbm@smithbrooker.com> 9/18/2009 9:20 AM >>>
Re: 2009-11 - Proposed Amendment of MCR 6.302 of the Michigan Court Rules requiring all plea discussions to take place on the record and proposed amendment to MCR 6.310 eliminating withdraw of a defendant's guilty plea if the trial judge does not follow a prosecutor's recommendation as to sentencing.

To the Justices of the Michigan Supreme Court,

I am opposed to both of these proposed changes. I was in the prosecutor's office for 24 years, and since then have been a defense attorney handling criminal cases for over 16 years, so I have been on both sides of plea negotiations. (In fact I started out when plea bargains were not even put on the record, although I think that that change was sensible and made the process much better.)

MCR 6.302

I think that this new proposal will be unnecessarily cumbersome, and will chill any full and frank discussions, which will result in fewer and "worse" plea bargains (less fair) due to lack of the ability to be frank with the other side, and the necessity to not make "admissions" which could be damaging to lawyer client relationships, and/or legally binding or politically damaging. Even if this proposal were to be limited to recording discussions which the trial judge is involved in, (which is not at all what the proposed rule change says), this proposal will still prevent a full and frank discussion for a number of reasons. Even if this is recorded in chambers, the transcripts will come out sooner or later, and will have a lot of unintended consequences, especially if the participants are just brainstorming etc..

Prosecutors will be affected. They will have to be very careful of any talk which might be taken as disparaging a victim or a witness, such as saying that the victim or witness is not believable or has credibility problems, or perhaps that they are partly responsible for the situation. The prosecutors will not be able to candidly say that they have a poor or weak case when telling the judge why they wish to offer the plea bargain involved. (This alone will make quite a difference since a judge might approve a lower Cobbs agreement than would otherwise be the case if the prosecution does not have strong proofs.) This means that the plea negotiations will not be as productive as they could be. How can one have a good plea bargaining session without a discussion of the strength of the prosecution's case, which is a central factor in most negotiations, other than those involving a "payoff" for testifying co-defendants or informants? Prosecutors will have to be very careful not to say anything which could be used against them politically because someone might argue that the statements show that the prosecutor is "soft on crime," or not willing to work hard, or is unsympathetic to one group of people or another etc.. Potential jurors may read about such articles in the paper and be biased because of the judge's, or lawyer's, feelings about a case. Such discussions may also reveal to the public, and hence potential jurors, a lot of otherwise prejudicial inadmissible evidence, or a defendant's (or victim's) bad background or prior legal troubles.

Defense attorneys also will have to be careful about what they say. Not only for some of the same reasons which might affect prosecutors, but also because such statements could affect the defendant's belief that the lawyer will work wholeheartedly for the client, or impolitic

statements might be used in grievances or malpractice lawsuits. They will also have to worry about how they will sound in the news media, because of political ambitions, business reasons, or social factors.

Judges will also have to be careful about what is said for many of the above listed reasons too.

One other point is that recording conversations between the defendant and his client would also be a violation of the attorney-client privilege and would subject the attorney to many of the same problems discussed above.

In addition what about informants? Telling the judge on the record that the defendant was an informant would be extremely detrimental; both to a defendant's willingness to be an informant in the first place, and potentially to a defendant's health. (It would also not help to allow such discussions to be subject to some sort of exception. It will soon become known what the exception is and thus that the defendant is an informant will be known too.)

All in all I think that this change would be a disaster! (Also completely ignoring the mechanics and cost of implementation.)

As with a lot of proposed rule changes I think that it is important to know what the problem is which it is suggested the change will solve. I have not heard of any dissatisfaction with the present rule. I think that the requirement to put the complete plea bargain on the record, which includes any Cobbs agreement, appropriately serves the purpose of memorializing the only important thing to come out of such negotiations--the result--so that there is not a dispute later on as to what it was that was agreed to. Beyond that why impose the additional costs and problems associated with effectuating such a change? I don't see how this proposal at all helps to makes sure that a defendant is not "coerced" into pleading guilty. For this motive to be effectuated would require recording the conversations between the defense attorney and client, and any other conversations defendant has with anyone else.. After all, in most cases it doesn't matter why a judge or prosecutor agrees to a specific plea bargain. The question is what is said to the defendant which persuades him to take the bargain. This would also not be a complete record since often defendant's talk to friends, relatives, and other defendants about whether or not to take a plea bargain. Lastly, there is always "coercion" in this process. The defendant takes a plea bargain because he or she is afraid of the consequences about what will happen if the plea bargain is *not* accepted. Thus they are "coerced" into the bargain. (We just don't want to have unconstitutional or unfair coercion in the system, but this rule change will not help.)

MCR 6.310

I am also extremely opposed to any rule change which does not allow a defendant to withdraw his guilty/no contest plea if the judge refuses to follow a prosecutor's sentencing recommendation. Defendant's are naturally very interested in what they will get as a sentence. An agreed upon specific sentence, or an agreement to sentence within the guidelines or in the lower half of the guidelines, etc. can be very helpful in obtaining a plea bargain, which is almost

always a “win-win” situation for both the defendant and the prosecutor. It also helps the system as a whole fairly dispose of cases. Changing the rule just injects uncertainty into the equation, and does not seem to help the system much. The only advantage might be a little time savings, generally only the time involved in the taking of the plea. However, this is not much time, especially when compared to the time involved in a trial. (And how many cases would this help anyway. There are very few motions to withdraw a plea. And even if the plea is withdrawn it may be helpful to the finding of truth at trial since the defendant can be impeached if he says anything differently at trial than he did during the guilty plea taking.)

What is “fair” about the rule change? All it does is force defendant’s to make decisions based on what they or their lawyer *think* a judge will do about a recommendation. This proposal is a big step away from due process.

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